IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8206 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

IBRAHIM FAKIRMAHMAD KHATIB

Versus

COMMISSIONER OF POLICE

Appearance:

MR SATISH R PATEL for Petitioner

SERVED for Respondent No. 1, 3

S.R. Divetia, APP for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/02/98

ORAL JUDGEMENT

On 30th September 1997, the Police Commissioner, Ahmedabad City invoking the powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act (hereinafter referred to as `the Act') passed the order of detention pursuant to which the petitioner is under detention. By this application under Article 226 of the Constitution he calls in question the legality and validity of that order.

2. Necessary facts in brief may be stated. The Police Commissioner, perusing the record found that against the petitioner two complaints in Dani Limda police station were filed, one of which was with regard to the offences punishable under Section 143, 147, 148, 323, 324, 504, 307 read with Section 149 Indian Penal Code and Section 25 (c) Arms Act, while the another was with regard to the offences punishable under Section 332, 324, 322, 504 r.w. Sec.114, Indian Penal Code and 135 (1) Bombay Police Act. After inquisition, the Police Commissioner also found that the petitioner was a head-strong person and by his continuous nefarious activities disturbing the public order, he was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present,he is in custody.

3. Challenging the order in question Mr. Patel, ld. advocate representing the petitioner has submitted that in no case the order can be maintained. There is no material on record going to show that the petitioner is a dangerous person. Even if the allegation about the aforesaid two complaints having been filed in the police station was accepted, it cannot be said that by such wrongs the public order would be disturbed and the petitioner can be described dangerous person within the meaning of the Act. It is further the contention that no doubt under Sec. 9(2) of the Act it is open to the authority passing the order of detention to withheld certain facts to the detenue in public interest. In this case no case for exercise of such descretion and to withhold the particulars about the witnesses is made out. Even the affidavit in that regard was also not filed. The order of detention is therefore on these 3 grounds bad and is liable to be quashed. However it may be stated that at the time of his submission when several queries were made Mr. Patel stuck to his only contention

namely unjust exercise of the privilege under Sec. 9(2) of the Act. When that is the case, I will confine to that only point on which both the parties have made extensive submissions. It may be stated that Mr. Divetia, ld. APP has supported the order in question.

4. Mr.Divetia, the learned AGP tenders the affidavit sworn in by Mr. G.R. Rajput. The same be taken on record though it is not on the point to be dealt with. Mr. Divetia has vehemently refuted the allegations made, submitting that there is no delay on the part of the authority passing the order of detention, promptly order was passed and in the public interest, certain facts & particulars are withheld.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme

whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to withhold the particulars about the witnesses keeping their safety in mind. In this case, no explanatory affidavit has ben filed so as to satisfy the court that the particulars of the witnesses kept concealed and away from the petitioner, was required to be kept secret keeping the safety of the witnesses in mind. It seems, the authority passing the order assigned the task to his subordinate and felt satisfied with the order the subordinate made. He has it seems mechanically accepted assuming that every thing was done in right way. When that is so, the exercise of privilege cannot be upheld, consequently by suppressing the particulars about the witnesses, the right of the petitioner to make effective representation has been jeopardised and therefore the order is liable to be quashed and continued detention must be held

unconstitutional.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 30th September, 1997 by the Police Commissioner, Ahmedabad City, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forth with, if not required for in any other case. Rule accordingly made absolute.

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